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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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MAR 16 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

JAMES A KAY, JR.)

WT Docket No. 94-147

Licensee of One Hundred Fifty-
two Part 90 Licenses in the Los
Angeles, California Area.)

To: Honorable Richard L. Sippel

PETITION FOR LEAVE TO FILE APPEAL

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.301(b) of the Commission's Rules, hereby petitions for leave to appeal the Presiding Judge's Order, FCC 98M-27, released March 10, 1998 (the "Order"). In support thereof, Kay states as follows:

1. Section 1.301(b) provides a basis on which to take an interlocutory appeal, with the Presiding Judge's concurrence, where there is a "new or novel" question of law or policy and the ruling is such that remand would be likely to occur if the appeal is deferred and raised as an exception. In the Order, the Presiding Judge denied Kay's request for a bill of particulars, which request was contained in his Motion for Extension of Time and Request for Bill of Particulars filed on March 3, 1998 (the "Motion").

2. The most egregious error in the Order is the Presiding Judge's failure to direct that the Bureau file a bill of particulars given the fact that: (a) under the proposed pre-trial and trial schedule (which is nothing more than a proposed modification of the schedule set by the Presiding Judge in his Order, FCC 97M-170, released October 14, 1997), the Bureau will present its direct case on June 12, 1998 after the proposed May 22, 1998 discovery cutoff date; and (b) Kay lacks notice regarding the specific issues that the Bureau will present at hearing.

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3. In ruling on the Motion, the Presiding Judge erroneously concluded, in page two of the Order, that:

Kay has knowledge from past prehearing conferences and rulings that he will obtain the Bureau's evidence in advance of the exchange of his evidence and that trial briefs have been prescribed to aid in trial preparation and to avoid surprise.

While it is helpful to obtain the Wireless Telecommunications Bureau's ("Bureau") direct case before trial, the value of this information is significantly reduced by the fact that Kay needs to know how the Bureau intends to proceed (in the form of a bill of particulars) prior to the conclusion of discovery. Under the schedule agreed to by counsel for the Bureau and Kay, the discovery deadline is May 22, 1998. It is of limited value to Kay for the Bureau to "show its cards" after the discovery deadline since it will then be too late for Kay to conduct discovery on those issues for which Kay will not have previously conducted discovery.

4. The Bureau's failure to provide Kay with a bill of particulars, and the Presiding Judge's corresponding unwillingness to compel the Bureau to do so, denies Kay of the ability to prepare for trial. Section 312(c) of the Communications Act of 1934, as amended (47 U.S.C. § 312(c)) and Section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(c)) grant licensees the right to notice and hearing prior to revocation of a license. The right to hearing includes a right to adequate notice of the issues against the licensee.¹

5. The Presiding Judge concluded that the Hearing Designation Order ("HDO"), together with information obtained from deposition discovery and various Freedom of

¹ See, e.g., Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Admin., 495 F.2d 975, 983 (D.C. Cir. 1974) ("An agency may not validly take action against an individual without a hearing unless its notice to the individual of the adverse action proposed to be taken against him specifies the nature of the facts and evidence on which the agency proposed to take action. Such notice enables the affected party to prepare an informed response which places all of the relevant data before the agency.").

Information Act requests submitted by Kay, constitute adequate notice to Kay of the specific charges against him, and that a bill of particulars is unnecessary. However, as demonstrated below, several issues designated in the HDO were not designated with specificity.

6. The contention that the HDO provides a sufficient statement of specifics as to the designated issues is meritless. For virtually every designated issue, the HDO contains nothing more than generalized and conclusory assertions with no specific factual allegations. In several instances, the HDO merely states that the Bureau "has information" that Kay "may" have committed one wrong or another. Attached hereto as Exhibit "A" is a copy of the September 15, 1994 memorandum from W. Riley Hollingsworth proposing that license revocation proceedings be initiated against Kay. The primary justification for instituting these proceedings offered by Hollingsworth was Kay's failure to provide information requested in the Section 308(b) request. As to the other issues, however, Hollingsworth admits that they are based only on unsubstantiated allegations. He advised the Bureau chief that "[w]e have confidence that discovery will reveal" such violations, or "[w]e included . . . miscellaneous allegations including possible misuse of Commission forms. These are based on various reports received from licensees." Despite Mr. Hollingsworth's admission in September, 1994 that the Bureau itself did not have sufficient particulars at the time it designated the case, the Presiding Judge ruled that the HDO provides Kay with sufficiently specific notice of the matters alleged against him.² This is clearly not the case. An examination of certain other issues in the HDO support Kay's argument.

² See P. 1 of the Order ("More importantly, Kay has been aware of the allegations in the designation order since December, 1994.") But See Transcript of Prehearing Conference in WT Docket No. 94-147, March 19, 1997, Pg. 214, wherein the Presiding Judge stated that "[w]e're having a hearing designation [against Kay] and now what you're telling me is you're seeking to depose in order to find out who might have information [to support the allegations against Kay contained in the hearing designation order] . . . [T]his information somehow or other should have been obtained before a hearing designation order was issued."

7. One issue in the HDO is whether "Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules." HDO at ¶ 10(c). This issue is phrased in almost as vague a form as possible. It references seven different rule sections and simply states there will be an inquiry into whether Kay violated any of them. The only discussion of this issue in the HDO is a generalized statement that the Commission has received complaints of the alleged violations, but absolutely no factual particulars are stated. If the Bureau, who has the dual burdens of proceeding and proof in this case, intends to charge at hearing that Kay failed to construct or deconstructed one or more stations, it must advise Kay of the stations involved and the dates or circumstances of the alleged violation.³

8. Contrary to the Order, the Bureau's responses to Kay's interrogatories have also been far short of helpful for Kay to properly prepare for trial. For example, in Interrogatory 5-1, Kay requested that the Bureau "state all relevant facts concerning each instance in which Kay and/or his sales staff is alleged to have misused or abused the Commission's processes." (emphasis added). The Bureau's inadequate response is as follows:

Attachments 21, 27 and 39-42 are complaints alleging that Kay misused and/or abused the Commission's processes. The persons named therein have direct knowledge of the facts at issue. In addition, . . . are believed to have direct

³ Another issue in the HDO is "whether James A. Kay, Jr. has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules." HDO at ¶ 10(b). The only specific statement in the HDO relating to this issue is that: "In a FCC field office inspection to verify the accuracy of a complaint, it was found that Kay was operating a conventional station in the trunked mode in violation of Section 90.113." HDO at ¶ 2. This was specifically referenced to an "Inspection of Station WNWK982 at Mount Lukens, CA conducted July 22, 1994 by the FCC's Los Angeles Field Office Bureau." Id. at n.4. In the absence of a bill of particulars specifically identifying any instances of alleged improper trunking not addressed in the July 22, 1994 inspection, Kay must assume that there are no other instances of improper trunking and will object to any attempt by the Bureau to introduce evidence of any other examples of alleged illegal trunking at hearing.

knowledge of relevant facts relating to instances of abuse of process. . . .
(emphasis added)

9. Not only have the Bureau's answers to interrogatories been of limited use, the Bureau's answers are contradicted by the testimony of the witness and the Bureau's own subsequent actions. For example, in response to Interrogatory 4-1, the Bureau listed both Christopher Killian and Gary Van Diest as persons "believed to have knowledge of instances of deliberate and/or malicious interference." During Mr. Killian's January 28, 1998 deposition taken in this proceeding (an excerpt of which is attached hereto as Exhibit "B"), Killian testified as follows:

Pg. 9, Line 19

Q. Do you have any personal knowledge that Mr. Kay has interfered with radio communications of others?

A. No.

Similarly, when the Bureau produced its List of Contemplated Witnesses on October 24, 1997, the Bureau stated that Mr. Van Diest "would be asked to give testimony regarding Kay's involvement in a license that was transferred to Marc Sobel," making no reference to Bureau's interference charge against Kay.

WHEREFORE, it is respectfully requested that the Presiding Judge permit an appeal to the Commission pertaining to the Presiding Judge's failure to direct the Wireless Telecommunications Bureau to file a bill of particulars or otherwise provide Kay with more specific information concerning its case before the close of discovery so that Kay may properly prepare for trial.

Respectfully submitted,

JAMES A. KAY, JR.

By: 

Barry A. Friedman
Scott A. Fenske
Thompson Hine & Flory LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

Dated: March 16, 1998

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: September 15, 1994

REPLY TO

ATTN OF: W. Riley Hollingsworth *WRH*
Deputy Chief, Licensing Division

SUBJECT: James A. Kay, Jr.
Draft, Order to Show Cause

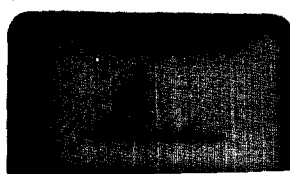
TO: Ralph A. Haller
Chief, Private Radio Bureau

THRU: Gary L. Stanford *GLS*
Chief, Licensing Division

After receiving complaints from several sources that James A. Kay, Jr. had not constructed some stations for which he holds licenses (including stations located on National Forest Service land) and that Kay falsely reports his loading, we sent Kay a § 308(b) letter requesting an inventory of his licenses, copies of Kay's forest service permits, and Kay's billing records. Kay requested and received three extensions of time, clarification of the information sought, confidentiality and some assurance that proprietary information would be kept confidential. Kay then refused to provide the information we sought stating through counsel that "there is no date...for which submission of the requested information would be convenient". Mass Media Hearing Division has indicated that they would put this case on for us. Whether they do it, or Common Carrier Enforcement or someone in PRB, it should be started very soon according to OGC. That office is handling Kay's FOIA litigation. With the present workload of the Licensing Division legal staff, it is imperative that we not put on the case, although of course my staff and the examiners would enthusiastically help out.

Our records show that Kay has more than one hundred and sixty licenses in the land mobile services concentrated in the L.A. market. He also does business and holds additional licenses under other names. His licenses include trunked and conventional SMR licenses as well as business radio service licenses. Almost all of these licenses allow Kay to provide for profit communication service.

The primary purpose of the attached order to show cause is to preserve our ability to require responses to § 308(b) letters. We feel that failing to follow through on our request for



information may jeopardize our ability to administer an effective compliance program.

We have confidence that discovery will reveal that not all of Kay's stations are constructed, and that he exaggerates his loading to avoid the consequences of our channel sharing and channel recovery provisions. We included in the draft order miscellaneous allegations including possible misuse of Commission forms. These are based on various reports received from licensees. OGC and Mass Media Hearing Division have worked with us on the Order to Show Cause and have approved it.

We have not included Appendix A which would list Kay's known licenses.

Draft
14:59 9/15/94

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JAMES A. KAY, JR.

Order to Show Cause
why more than one
hundred sixty four Part 90
licenses should not
be revoked or cancelled.

Order to Show Cause
why Kay should not be
ordered to cease and
desist from certain
violations of Commission
rules.

ORDER TO SHOW CAUSE AND
HEARING DESIGNATION ORDER

Adopted:

Released:

By the Commission:

1. The Commission has before it for consideration more than one hundred sixty four land mobile licenses¹ authorized under Part 90 of the Commission's Rules. 47 C.F.R. § 90.1 et seq. The licensee, James A. Kay, Jr., has failed to respond to Commission requests for written statements of fact. In addition, we have reason to believe he has failed to comply with the Commission's Rules, and may not possess the character qualifications necessary to be a Commission licensee. For the reasons that follow, we will order Kay to show cause why his licenses should not be revoked or cancelled, and designate the matter for a hearing before an administrative law judge.

2. In response to complaints regarding the construction and operational status of a number of Kay's licensed facilities, on January 31, 1994, Commission staff requested additional information to determine whether Kay had committed rule violations by operating systems in the trunked mode that were licensed for conventional use and by not meeting the construction and placed-in-operation requirements of the Commission's Rules. 47 C.F.R. §§ 90.155, 90.631 and 90.633. This letter also requested information to enable the staff to determine if stations licensed to Kay have permanently discontinued operation in violation of our rules. 47 C.F.R. § 90.157. The letter also directed Kay to provide information detailing the loading of end users on Kay's base stations in order to assess Kay's compliance with our "forty mile" rule, which prohibits licensees from obtaining additional license grants within forty miles of an existing station until the existing station is loaded

¹ See Appendix A.

to 70 mobile units per channel, and to apply our channel sharing and recovery provisions. 47 C.F.R. §§ 90.623, 90.627, 90.631 and 90.633.

3. We have received complaints that some of Kay's stations are not constructed. Because many of the stations are licensed to operate from mountain peaks managed by the U.S. Forest Service in the Los Angeles area, U.S. Forest Service permits are required to construct and operate on the peaks. In order to assess compliance with our construction and operation requirement, the staff requested that Kay identify the stations for which he holds FCC licenses as well as those he manages. The staff directed Kay to note those that are on U.S. Forest Service land.

4. Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe these names include some or all of the following: Air Wave Communications, John C. Allen dba Buddy Sales, Buddy Corp., Buddy Sales, Buddys Sales, Buddy Corp. dba Buddy Sales, Buddy Corp. dba Southland Communications, Consolidated Financial Holdings, Hessman Security, Roy Jensen, James Kay, James A. Kay, Jr., Lucky's Two Way Radio, Luckys Two Way Radio, Luckys Two Way Radios, MetroComm, Multiple M Enterprises, Inc., Oat Trunking Group, Oat Trunking Group, Inc., Marc Sobel dba Airwave Communications, Southland Communications, Southland Communications, Inc., Steve Turelak, Triple M Enterprises, Inc., V&L Enterprises, and VSC Enterprises. The inquiry letter sent to Kay directed that he identify all station licenses he holds under all names under which he does business.

5. The letter also requested that Kay substantiate the loading of his stations by providing customer lists and telephone numbers. Such business records are the Commission's generally acceptable proof of loading. Kay was assured that proprietary information would be considered confidential.

6. Kay filed a response that provided none of the requested information. He simply referenced some dissimilar information provided to the Commission staff at other times. Kay failed to provide the requested information after numerous extensions of time, responding at one point that "there is no date...for which submission of the requested information would be convenient". Accordingly, we will designate this matter for hearing to determine Kay's fitness to remain a Commission licensee, in light of his conduct and his refusal to respond to the Commission inquiry.

7. We have also received complaints from various parties that James A. Kay, Jr. misused the Commission's processes. For example, licensees have complained that Kay has fraudulently induced them to sign blank Commission forms seeking modification of license. Kay allegedly then uses the form to cancel the licenses.

8. Accordingly, IT IS ORDERED that pursuant to Section 312(a) of the Communications Act of 1934, as amended, James A. Kay, Jr. is directed to show cause why his licenses should not be revoked or cancelled² at a hearing before an Administrative Law Judge, at a time and place to be designated in a subsequent Order, upon the following issues:

a) To determine whether James A. Kay, Jr. has abused the Commission's processes by failing to respond to a Commission inquiry;

b) To determine whether James A. Kay, Jr. has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17, by failing to respond to a Commission inquiry;

² Several of the rule violations discussed above are subject to an automatic cancellation condition: if the licensee does not meet his or her construction deadline, or if the licensee permanently discontinues operation, the license cancels automatically. See e.g., 47 C.F.R. §§ 90.157, 90.631 and 90.633.

c) To determine whether James A. Kay, Jr. has exceeded his license authority by operating systems in the trunked mode that were authorized for conventional use and to determine if he has violated any of the following: Sections 90.155, 90.157, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules, 47 C.F.R. §§ 90.155, 90.157, 90.623, 90.627, 90.631, and 90.633;

d) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result of violations listed in subparagraph (c);

e) To determine whether James A. Kay, Jr. has misused the Commission's processes in order to defraud other licensees;

f) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee; and

g) To determine whether Kay should be ordered, pursuant to Section 312(b) of the Communications Act of 1934, as amended, to cease and desist from violation of Commission Rules 1.17, 90.155, 90.157, 90.623, 90.627, 90.631, 90.633, 47 C.F.R. §§ 1.17, 90.155, 90.157, 90.623, 90.627, 90.631, 90.633.

9. IT IS FURTHER ORDERED that the above issues be consolidated for hearing pursuant to Section 1.227(a)(2) of the Commission's Rules.

10. IT IS FURTHER ORDERED that the Chief, Private Radio Bureau SHALL BE a party to the proceeding.

11. IT IS FURTHER ORDERED, that to avail themselves of the opportunity to be heard, the parties, pursuant to Section 1.91(c) of the Commission's rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order a written appearance stating that they will appear at the hearing and present evidence on the matters specified in the Order. If a party fails to file an appearance within the time specified, the right of that party to a hearing shall be deemed to have been waived. See Section 1.92(a) of the Commission's rules. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order. See Section 1.92(a) of the Commission's rules. In the event the right to a hearing is waived by all the parties to this proceeding, the presiding Officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. See Section 1.92(c) of the Commission's rules.

12. IT IS FURTHER ORDERED that the burden of proceeding with the introduction of evidence and the burden of proof shall be on the Private Radio Bureau.

13. IT IS FURTHER ORDERED that the Secretary send a copy of this order via certified mail-return receipt requested to Dennis K. Brown, Esquire, Brown and Schwaninger, P.C., 1835 K Street N.W., Suite 650, Washington, D.C. 20006. and have this order or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

1 and information you may have learned from others. I
2 would like you to consider personal knowledge as
3 information that you personally learned or witnessed,
4 and all other knowledge as knowledge you learned from
5 others.
6 Do you understand that distinction?
7 A Yes.
8 Q Just to make it clear, I'm going to give
9 you an example. If I witnessed an individual striking
10 another person, I have personal knowledge that that
11 individual struck that person. If the person who
12 struck that person told me he struck him, I don't have
13 personal knowledge of it. I have hearsay or secondhand
14 knowledge of that information.
15 Do you understand the distinction?
16 A Yes.
17 Q Okay. Good. I will proceed on that
18 basis.
19 Do you have any personal knowledge that
20 Mr. Kay has interfered with radio communications of
21 others?
22 A No.
23 Q Do you have any other knowledge that
24 Mr. Kay may have interfered with radio communications
25 of others?

9

1 Q This first communication regarding
2 interference by Mr. Kay for Mr. Doering, do you recall
3 that?
4 A Do I recall the interference? Do I
5 recall --
6 Q No. Do you recall the conversation?
7 A Yes.
8 Q And what did Mr. Doering say?
9 A My recollection was that Mr. Doering
10 indicated that Kay had set up a jamming transmitter and
11 there were some specifics I can't remember, but that
12 Kay was jamming Doering's repeater, one of Doering's
13 repeaters.
14 Q Did Mr. Doering say how he knew such
15 information?
16 A My recollection was that he said he traced
17 it to Kay's -- to Kay.
18 Q Did you take any independent steps to
19 verify that information from Doering?
20 A No.
21 Q In this communication in the early '90s
22 from Mr. Pick, what did Mr. Pick tell you regarding
23 Mr. Kay's practices with respect to jamming radio
24 communications, and let me say alleged practices?
25 A My recollection was that Harold Pick told

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1 A Other knowledge?
2 Q Yes.
3 A Yes. Secondhand information.
4 Q Okay. What secondhand information do you
5 have?
6 A Information from certain individuals who
7 alleged that Mr. Kay has interfered with their
8 stations.
9 Q Okay. Can you tell me the first
10 approximate date that you learned such information?
11 A Sometime in the early '90s. I can't -- I
12 don't remember the specific date.
13 Q And who did you learn that -- who did
14 you -- from whom -- strike all that.
15 From whom did you hear that Mr. Kay had
16 interfered with another's radio communications?
17 A Jim Doering.
18 Q From anyone else?
19 A Harold Pick. I believe, Phil Gigliotti.
20 Those are the only ones that come to mind right now. I
21 believe there are others, but I can't recall them at
22 this time.
23 Q Now, when you say "early '90s," can you
24 give me an approximate year?
25 A No.

10

1 me that Kay had jammed his frequencies, duplicated
2 CTCSS tones, and had told Pick over Pick's repeater to
3 get off my channel or something to that effect, and
4 generally Pick indicated that Kay harassed him over
5 Pick's repeater.
6 Q Did you conduct any independent
7 investigation of Mr. Pick's allegations?
8 A No.
9 Q And what did Mr. Phillip Gigliotti say to
10 you regarding the alleged interference by Mr. Kay?
11 A My recollection is that Phil Gigliotti
12 stated that Kay had duplicated channels with him and
13 that Kay was interfering with Gigliotti's customers.
14 Q Is that your entire recollection?
15 A It's my best recollection.
16 Q And did you independently verify any of
17 these allegations by Mr. Phillip Gigliotti?
18 A No.
19 Q These communications with Mr. Doering,
20 Mr. Pick, and Mr. Gigliotti occurred in the early
21 1990s; correct?
22 A There were numerous conversations. My
23 best recollection is first conversations went back to
24 early '90s and maybe continued on through the mid-
25 late '90s. My best recollection is the first

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CERTIFICATE OF SERVICE

I, Scott A. Fenske, do hereby certify that I have, on this 16th day of March, 1998, served a copy of the foregoing "Motion for Leave to File Appeal," upon the following parties via hand-delivery:

Hon. Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, NW
Washington, D.C. 20554

John J. Schauble, Esq.
Federal Communications Commission
Wireless Telecommunications Bureau
Room 8308
2025 M Street, NW
Washington, DC 20554

and via first-class mail, postage prepaid to:

William H. Knowles-Kellett, Esq
Federal Communications Commission
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, PA 17325-7245

